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*Electronically filed on April 4, 2011*

*Counsel for American Pacific Financial Corporation*

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

**In re**

**Case No. BK-S-10-27855-BAM**

**AMERICAN PACIFIC FINANCIAL CORPORATION**

**Chapter 11**

**Debtor.**

**DEBTOR'S OMNIBUS OPPOSITION TO  
MOTION TO APPOINT TRUSTEE  
[Docket # 233] AND SEC JOINDER  
[Docket #246]**

**Date: April 18, 2011  
Time: 9:30 a.m.**

American Pacific Financial Corporation, Debtor and Debtor In Possession ("Debtor" or "APFC") by and through its undersigned counsel, files this Omnibus Opposition to the Acting United States Trustee's Motion for Appointment of a Chapter 11 Trustee Pursuant to 11 U.S.C. §1104(a)(1)(the "Motion") and the "Joinder" filed by the Securities Exchange Commission (the "Joinder"). This Opposition is based upon the Declaration of Larry Polhill (the "Polhill Declaration"), the Declaration and Request for Judicial Notice filed by Kaaran Thomas, Esq. and the exhibits attached thereto and the points and authorities below.

**BACKGROUND**<sup>1</sup>

1. The Motion and Joinder allege fraudulent misrepresentations to noteholders by Mr. Polhill, APFC's President, between 1994 and 2008. Based upon the present status of this case and the facts set forth below and in the Declaration of Mr. Polhill, these allegations do not constitute "cause" for appointment of a trustee within the meaning of 11 U.S.C. Section 1104(a)(1). Trustee does not assert that grounds exist for the appointment under 11 U.S.C. Section 1104(a)(2).

**Status of the Case**

2. APFC's Amended Plan [Docket #253] does not propose the issuance of further notes. It is a liquidating plan that transfers all APFC assets to a Trust with an independent trustee selected by the Official Committee of Unsecured Creditors (the "Committee"). Debtor has provided all information requested by the Committee and its accountant and counsel regarding Debtor's assets and Mr. Polhill's alleged misconduct. Mr. Polhill has been examined under oath in a 2004 exam and he and the Debtor have provided all documents requested by the Committee. Debtor has also responded to requests for additional information from the Securities Exchange Commission and has included the substance of the responses in its Amended Disclosure Statement.

3. Assuming the Amended Disclosure Statement is approved on April 18, Debtor will seek the earliest possible confirmation date. Since the Amended Plan is a liquidating plan it need not meet the stricter standards required for a plan of reorganization. The Amended Plan satisfies the absolute priority rule (11 U.S.C. Section 1129 (b)) and gives creditors of this Estate control over all of Debtor's assets, including all causes of action.

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<sup>1</sup> The factual allegations set forth in this section are supported by the Declaration of Larry Polhill In Support of Opposition to Motion to Appoint Trustee (the "Polhill Declaration") and the Declaration and Request for Judicial Notice of Kaaran Thomas, Esq. filed contemporaneously herewith, and the exhibits attached thereto.

1                   **Facts Surrounding Allegations of Fraud and Misconduct**

2           4.       Since Mr. Polhill will no longer control Debtor's assets after the Amended Plan is  
3 confirmed, the allegations of "fraud" in both the Motion and Joinder would be material and  
4 constitute "cause" (assuming they were true) only if Debtor chose not to proceed to confirmation  
5 of its Amended Plan. Furthermore, these allegations are as yet unproven. Indeed, Trustee's  
6 allegations are apparently based upon interviews with Mr. Pabon, Hazell and Mudd. To Debtor's  
7 knowledge, the Trustee made no attempt to verify these allegations with the Debtor. This  
8 Opposition sets forth material facts regarding and controverting these allegations.

9  
10          5.       Debtor does not disagree with Trustee's description of the elements of a fraud  
11 claim. A Plaintiff must demonstrate: a false representation made with knowledge or belief that it  
12 is false or without a sufficient basis of information, intent to induce reliance, and damage  
13 resulting from the reliance. Collins v. Burns, 103 Nev. 394, 741 P.2d 819, 821 (1987).

14  
15          6.       The majority of the claims involve failure to manage the creditors' collateral after  
16 the notes were issued. Possibly the most significant issue is failure to file UCC-1's or mortgages  
17 perfecting the creditors' interest in their collateral. The facts, as indicated by Mr. Polhill's  
18 Declaration, do not demonstrate an intent to defraud at the time the notes were issued or renewed.  
19 Debtor has significant defenses to each of these claims based upon the facts set forth below.<sup>2</sup>

20  
21                   a.       **Hazell/USPL**

22          7.       The Trustee and the SEC assert that APFC fraudulently misrepresented to Hazell  
23 that APFC (and its predecessor AMPAC) pledged equipment of U.S. Plastic Lumber Equipment  
24 Financing ("USPL") "worth over \$1 million which could be sold to satisfy APFC's obligations  
25 under the note." They claim this statement was false because "Unbeknownst to Hazell in July,  
26 2004, USPL had already filed a voluntary petition under Chapter 11 in the Southern District of  
27

28  

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<sup>2</sup> Debtor responds to these allegations in the order they are raised in the SEC Joinder.

1 Florida. An affiliate of the Debtor, AMPAC Capital Solutions, made an appearance in the USPL  
2 bankruptcy case in August 2004, four months prior to when Hazell signed the promissory note  
3 with APFC.” [SEC Joinder page 3 lines12].

4 8. The financing to which Mr. Polhill referred was Debtor In Possession Financing.  
5 USPL and its affiliates U.S. Plastic Lumber Ltd., The Eaglebrook Group, Inc., U.S. Plastic  
6 Lumber Finance Corporation, U.S. Plastic Lumber IP Corporation filed Chapter 11 cases in the  
7 Southern District of Florida on July 23, 2004. The cases were jointly administered under Case  
8 No. 04-33579-PGH.

10 9. The docket is available on the PACER system, as are the pleading attached to the  
11 *Declaration and Request for Judicial Notice of Kaaran Thomas, Esq.*, (the “Thomas  
12 Declaration”). Certain of the relevant pleadings, including the initial petition and the schedules  
13 and the December 10, 2004 *Emergency Motion By Debtor U.S. Plastic Lumber Corp. To (A)*  
14 *Modify and Amend Certain Terms and Provisions of Post Petition Financing From AMPAC*  
15 *Capital Solutions, LLC and (B) Enter Into First Amendment to Credit and Security Agreement*  
16 *Pursuant to 11 USC 364(c) and (d) and FRBP 4001 (Emergency Hearing Requested Pursuant to*  
17 *Local Rule 9075)* are not available on PACER. However, the Supplement to Disclosure  
18 Statement describing the terms of the AMPAC financing and the subsequent sale of the USPL  
19 collateral to AMPAC is available and is attached to the Thomas Declaration as Exhibit “1”.

22 10. USPL’s Chapter 11 proceeding **made possible** the lien on USPL equipment that  
23 was described to Hazell, rather than defeat it. AMPAC subsequently acquired the equipment  
24 pursuant to the terms (including a credit bid) that are described in Exhibit 1, the USPL  
25 *Supplement to Disclosure Statement* attached to the Thomas Declaration. The sale price was far  
26 more than One Million Dollars. Mr. Hazell’s note was current at the time of the USPL/AMPAC  
27 purchase and sale.

1 11. AMPAC was a wholly owned subsidiary of APFC, which was subsequently  
2 dissolved and merged into APFC. APFC advanced the money which AMPAC used to loan to  
3 USPL and proceeds from the USPL equipment were paid to APFC until AMPAC was merged  
4 into APFC.

5  
6 **b. Glen Cove Notes/ Hazell**

7 12. The Hazell notes were renewed September, 2007 and January 2008. The allegedly  
8 false statement in connection with these renewed obligations is that the "Glen Cove property had  
9 already been assigned to a third party mortgage lender".

10 13. The Glen Cove note is attached to the Hazell Declaration as Exhibit "B". The note  
11 does not state that the security is a first lien. The existence of liens on the property was readily  
12 ascertainable through title searches. In 2008, the Glen Cove property was valued by an  
13 independent appraiser (Cushman Wakefield) at Thirty-Five Million Dollars. This amount would  
14 have more than covered the senior debt of \$21,000,000.00 due to the Reckson Glen Cove Mezz  
15 Lender LLC and the Hazell notes if not for the downturn in the economy. A copy of the  
16 conclusion pages of the Cushman Wakefield Appraisal is attached as Exhibit 1 to the Polhill  
17 Declaration. Debtor's interest in the Glen Cove property is still an asset of the estate (Debtor still  
18 owns the interests in Glen Cove LLP and Glen Cove LLP still owns the property). The  
19 obligations to the senior lender are in default, but the senior lender has not yet taken the property  
20 in foreclosure. The Liquidating Trust will retain the ability to work out an arrangement with the  
21 senior lender should it desire to do so.

22  
23  
24 **c. William Mudd Overview**

25 14. A review of Mr. Mudd's account indicates that he has invested \$1,567,065.60 with  
26 the company and has received \$1,714,037.00 in cash or property. A true and correct copy of the  
27 account is attached to the Polhill Declaration as Exhibit "2".  
28

1           15. Mr. Mudd is owed the interest on his loans. That debt has as now been reduced to  
2 judgment, which is recorded against certain of Debtor's parcels of real estate, one of which is  
3 otherwise unencumbered (Hesperia Parcel 5). Debtor was not aware of the judgment lien, but  
4 was aware of the judgment, which is reflected on Debtor's schedules [Pacer Doc # 26 page 3 filed  
5 October 5, 2010].  
6

7           16. Debtor's Amended Plan lists the Hazell judgment lien as a secured claim in Class  
8 1A [Docket #253]. The Amended Plan provides the following treatment for Class 1A creditors:

9           Treatment: Class 1A creditors will retain their liens on the property securing payment of  
10 their Allowed Secured Claims. They will have the election to either receive their  
11 collateral on the Effective Date or have their collateral assigned to the Trust. If they  
12 elect to have their collateral assigned to the Trust, and if the Liquidating Trustee agrees  
13 to accept the Collateral, the Trust will manage and sell the collateral. Class 1A creditors  
14 will receive the Net Proceeds from sale of their collateral. The secured claimant shall  
15 retain its liens until the secured claim is paid in full.

16           17. Mr. Mudd has not lost the principal amount of his loans to the Debtor. His  
17 unsecured claim will be reduced further by the value of the Hesperia properties.

18                   **d. GB&L Note/Mudd**

19           18. In May, 2003 the Mudds invested \$360,134 and accepted a Contractual Loan  
20 Agreement / Promissory Note ("GBL note") with interest rate of 9% per annum, which paid  
21 monthly payments of \$2,701, interest only. At the time of this investment, GB & L owed APFC  
22 in excess of \$2 million. In May, 2003, GB&L was current on its obligations to APFC.

23           19. The Mudds voluntarily renewed their note in March, 2005. GB&L was current in  
24 its payments to Debtor at that time. In November, 2005 a truck driver employed by GB&L  
25 caused a multi fatality accident, which resulted in a multi million dollar judgment against the  
26 Debtor. The judgment destroyed GB&L's ability to pay its obligations, including its obligations  
27 to APFC. APFC continued to pay the Mudds until 2008.  
28

1                   **e.       Orange Texas Note/Mudd**

2           20.     The alleged false statement regarding the Orange Texas Note is that Mudd's  
3     \$400,000 note was "purportedly secured by certain real estate located in Orange Texas." Mudd  
4     has suffered no damage from his lack of a mortgage. The Orange, Texas property was severely  
5     impacted by several hurricanes in the Gulf region and its value was destroyed. In March, 2008,  
6     APFC delivered a deed to the Orange, Texas property to Mr. Mudd. He refused to accept the  
7     deed. After Mr. Mudd's refusal APFC deeded the property to the original owner.  
8

9                   **f.       Pabon/Hesperia Note**

10          21.     The allegedly false statement made to Mr. Pabon is that his note was secured by  
11     the Hesperia property and that at a point before the last renewal (February 2004) the property was  
12     sold. Allegedly, after February 2004, Mr. Pabon continued to receive notes stating they were  
13     secured by the Hesperia property. At that time, Mr. Pabon was, and he continues to be, the  
14     registered agent for service of process of several APFC subsidiaries in Nevada. He spoke to Mr.  
15     Polhill regularly about the Debtor and its business. Mr. Pabon referred many people to APFC  
16     (including Mr. Hazell). Mr. Pabon never asked about the Hesperia property and was most likely  
17     aware of its status because of his involvement with the Debtor, even if the disposition of the  
18     property had not been a matter of public record.  
19

20          22.     Debtor's failure to provide formal notice of the subsequent sale of the Hesperia  
21     property may be evidence of negligence but it does not demonstrate that at the time the note was  
22     issued or renewed APFC intended to defraud Mr. Pabon; nor is it material misconduct. Mr.  
23     Pabon received regular payments of the amounts due on his note until 2008.  
24

25          23.     The status of the Hesperia property was at all relevant times a matter of public  
26     record.  
27

28          24.     Mr. Pabon's concern regarding his IRA statement is a result of the difference



1 between the book value of the notes (which remains the \$41,000) and the value reported to the  
2 IRA agent, which reflects the decline in the real estate market.

3 **Other Notes**

4 25. Trustee points out the existence of “many other notes” attached to proofs of claim  
5 that are filed as secured. Debtor is of the opinion that the same issues arise with many of these  
6 claimants.  
7

8 26. The fact that the status of much of the noteholders’ collateral (and their interest in  
9 the collateral) was a matter of public record may refute the “intent to defraud” element of a fraud  
10 case, as well as the “justifiable reliance” element. Moreover, APFC paid its creditors until the  
11 value of its assets (and its ability to pay creditors) was impaired by events beyond the Debtor’s  
12 control. Debtor could not anticipate the GB&L accident, hurricanes and the serious downturn in  
13 the economy. There is no indication that APFC’s representations were materially false at the time  
14 they were made. There is no evidence that APFC mismanaged its assets.  
15

16 **Trustee and the SEC Have Not Demonstrated “Cause” To Appoint a Trustee**

17 27. The facts set forth above provide the basis for a colorable defense on the part of  
18 APFC and Mr. Polhill. These facts do not provide cause for appointment of a trustee, especially  
19 in light of Debtor’s liquidating plan.  
20

21 **Mr. Polhill Has Not Benefitted From Any Alleged Misconduct**

22 28. There is no proof (and no allegation) that Mr. Polhill was involved in a “Ponzi  
23 Scheme”; that he benefitted personally from any of the alleged misrepresentations or investments  
24 or did anything other than to protect the Debtor’s assets during the downturn.

25 29. The Committee’s accountant spent a day in Debtor’s offices conducting a  
26 preliminary review of books and records and attended Mr. Polhill’s 2004 examination. The  
27 accountant initially concluded that there were “missing funds” based upon an increase in long  
28



1 term liabilities between 2005 and 2010. At his 2004 examination, Mr. Polhill produced  
2 documentation explaining the increase. Mr. Polhill also explained issues relating to the  
3 accountant's opinion that APFC was insolvent from 2005. The accountant had valued APFC's  
4 assets at book value.

5  
6 30. Mr. Polhill has not received any salary from the Debtor since 2008. He provided  
7 his personal tax returns to the accountant and to counsel for the Committee subject to a  
8 confidentiality agreement.

### 9 **Securities Issues**

10 31. The SEC Joinder raises issues regarding possible violation of securities laws.  
11 Debtor is not in a position to address these issues; however, Debtor does not propose to issue  
12 securities or to remain in business. Debtor would note, however, that many of the proofs of claim  
13 contain a Securities notice that the securities have not been registered like the one attached to  
14 Claim 9-1. The most effective way to deal with any such issues is to promptly confirm the  
15 Amended Plan.  
16

### 17 **Costs of Administration**

18 32. The Debtor's Monthly Operating Report for February [Docket No. 228 attached to  
19 the Thomas Declaration] indicates that Debtor has \$47,377.96 in its bank account. Debtor has  
20 incurred almost \$200,000 of professional fees, although those fees have yet to be approved by the  
21 Court. The fees are reflected in Debtor's Disclosure Statement). Debtor cannot afford to incur  
22 additional administrative expenses. It is using its best efforts to minimize expenses so it will be  
23 able to transfer its assets to the trust under its Amended Plan.  
24

### 25 **POINTS AND AUTHORITIES**

26 33. Section 1104(a) of the Bankruptcy Code, 11 U.S.C. § 1104(a), authorizes the  
27 appointment of a trustee in a chapter 11 case in two circumstances. Section 1104(a) states:

28 (a) At any time after the commencement of the case but before confirmation of a plan, on request

1 of a party in interest or the United States trustee, and after notice and a hearing, the court shall  
2 order the appointment of a trustee-

3 (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs  
4 of the debtor by current management, either before or after the commencement of the case, or  
5 similar cause, but not including the number of holders of securities of the debtor or the amount of  
6 assets or liabilities of the debtor; or

7 (2) if such appointment is in the interests of creditors, any equity security holders, and other  
8 interests of the estate, without regard to the number of holders of securities of the debtor or the  
9 amount of assets or liabilities of the debtor.

10 11 U.S.C. § 1104(a) (emphasis added).

11 **Cause Must Be Determined On A Case-By-Case-Basis Based On Established**  
12 **Criteria**

13 34. Trustee and the SEC base their case on alleged incidences of “fraud, dishonesty,  
14 incompetence or gross mismanagement of the affairs of the debtor by current management, either  
15 before or after commencement of the case, or similar cause...” [11 U.S.C. §1104(a)(1)] (“Section  
16 1104”). Their joint position is that the mere existence of these acts, regardless of how far  
17 removed in time and relevance to the current status of a debtor’s case, deprive the court of its  
18 judicial discretion regarding the appointment of a Trustee. The Motion and Joinder imply that the  
19 court should ignore the fact that the actions occurred between 2004 and 2008, two years prior to  
20 the date the case was filed, and that Debtor has filed a liquidating plan. Their position, apparently,  
21 is that the term “cause” does not require a judicial review and determination of the materiality of  
22 the alleged conduct and its relationship to the outcome of the case.

23 35. This “strict construction” would be counterproductive to the best interests of  
24 creditors and flies in the face of existing case law.

25 36. The determination of “cause” for appointment of a trustee must be made on a case-  
26 by-case basis, keeping in mind the general presumption that a debtor-in-possession should be able  
27 to remain in possession absent a showing to the contrary. In In re Marvel Entertainment Group,  
28 Inc., 140 F.3d 463, 471 (3d Cir.1998), the court explained:

1 “It is settled that appointment of a trustee should be the exception, rather than the rule.”  
 2 [citation omitted.] In the usual chapter 11 proceeding, the debtor remains in possession  
 3 throughout reorganization because “current management is generally best suited to  
 4 orchestrate the process of rehabilitation for the benefit of creditors and other interests of  
 5 the estate.” Thus, the basis for the strong presumption against appointing an outside  
 6 trustee is that there is often no need for one: “The debtor-in-possession is a fiduciary of  
 7 the creditors and as a result, has an obligation to refrain from acting in a manner which  
 could damage the estate, or hinder a successful reorganization.” [Citation omitted.] The  
 strong presumption also finds its basis in the debtor-in-possession's usual familiarity  
 with the business it had already been managing at the time of the bankruptcy filing, often  
 making it the best party to conduct operations during the reorganization.

8 37. The actions alleged by a person seeking to invoke Section 1104 must be  
 9 “material”. An action is material if it exists “by reason of any direct or indirect relationship to,  
 10 connection with, or interest in, the debtor ....” 11 U.S.C. § 101(14)(E). See also Black's Law  
 11 Dictionary 998 (8th ed.2004) (defining “material” as “[h]aving some logical connection with the  
 12 consequential facts” or being “[o]f such a nature that knowledge of the item would affect a  
 13 person's decision-making; significant; essential....”). In re AFI Holding, Inc., 530 F.3d 832, 845  
 14 (9<sup>th</sup> Cir., 2008).

16 38. Neither the Trustee nor the SEC has provided evidence of any “material fact.”  
 17 That would support appointment of a trustee in this case. The alleged conduct relates to the  
 18 issuance of promissory notes. Debtor has not proposed to issue notes under its plan.

### 19 **Appointment of A Trustee Involves Judicial Discretion**

20 39. It is true that appointment of a trustee is mandatory if “cause” under 11 U.S.C.  
 21 §1104(a)(1) (hereafter “Section 1104”) is found; however, the determination of what constitutes  
 22 “cause” is subject to the court’s discretion.<sup>3</sup> In the Briarwood case, Judge Bowie (echoing the  
 23 reasoning of G-I Holdings) explained that while appointment of a trustee is mandatory upon a  
 24 finding of cause under Section 1104(a) (1), a determination of “cause” under subsection (1) is  
 25

26  
 27 <sup>3</sup> In re G-I Holdings, Inc., 295 B.R. at 507, aff'd 385 F.3d 313, 317 (3d Cir.2004); In re Briarwood Capital, LLC,  
 28 2010 WL 2884949 (Bankr.S.D. Cal. 2010), In re Sundale, Ltd. 400 B.R. 890 (Bankr.S.D. Fla. 2009).

1 within the court's discretion. In re G.I. Holdings, Inc., supra, 295 B.R. at 507.

2 **Trustee and the SEC Have Not Demonstrated “Cause” for the Appointment of a**  
3 **Trustee**

4 40. Courts have established various factors to be considered in determining whether  
5 cause exists under Section 1104(a)(1). The factors include: 1) Materiality of the misconduct; 2)  
6 Evenhandedness or lack of same in dealings with insiders or affiliated entities vis-à-vis other  
7 creditors or customers; 3) The existence of pre-petition voidable preferences or fraudulent  
8 transfers; 4) Unwillingness or inability of management to pursue estate causes of action; 5)  
9 Conflicts of interest on the part of management interfering with its ability to fulfill fiduciary  
10 duties to the debtor; 6) Self-dealing by management or waste or squandering of corporate assets.  
11 In re Intercat, Inc., 247 B.R. 911, 921 (Bankr.S.D.Ga.2000).

13 41. The court may consider the cumulative or collective impact of the alleged  
14 problems or issues (the” totality of the circumstances”) in making its decision. In re Cardinal  
15 Indus., Inc., 109 B.R. 755 (Bankr.S.D.Ohio 1990). In re Sharon Steel Corp., 871 F.2d 1217, 1228  
16 (3d Cir.1989), In re Sundale Ltd., 400 B.R. 890 (Bankr. S.D. Fla. 2009). It is not merely the  
17 actions of a debtor, but the level of the acts that determine “cause”. The conduct, failure to act, or  
18 gross mismanagement, or the like, must “[rise] to a level sufficient to warrant the appointment of  
19 a trustee.” Comm. of Dalkon Shield Claimants v. A.H. Robins Co., 828 F.2d 239, 242 (4th  
20 Cir.1987) (quoting In re General Oil Distributors, Inc., 42 B.R. 402 (Bankr.E.D.N.Y.1984)).

22 42. In the Sundale case, supra, Judge Isikoff determined that a number of actions  
23 similar to the ones listed by the Trustee including (1) prepetition failure on part of Chapter 11  
24 debtors' principal to observe corporate formalities;(2) failure on part of Chapter 11 debtors-in-  
25 possession to pay taxes; and (3) failure to accurately disclose, on statement of financial affairs all  
26 their prepetition payments and transfers to insiders did not constitute “cause” for appointment of  
27 trustee given the facts of the case. Sundale, supra, 400 B.R. at 903-904.  
28

1           43. Trustee acknowledges the factors [in paragraph 37 above] that “have imbued” the  
2 term “cause” in Section 1104(a)(1), as discussed in the G.I. Holdings and Briarwood Capital  
3 decisions [see Motion paragraph 47]. He asserts, without any supporting facts, that the  
4 allegations of Mssrs. Mudd, Hazell and Pabon regarding events of 2004 to 2008 satisfy these  
5 factors. Yet he fails to tie these allegations to any of the cited factors. He fails to show that the  
6 alleged fraudulent conduct is material given the posture of this case; how Mr. Polhill has been  
7 less than evenhanded in dealings with insiders or affiliated entities; the existence of pre-petition  
8 voidable preferences or fraudulent transfers; unwillingness or inability of Mr. Polhill to pursue  
9 estate causes of action (all causes of action will be transferred to the Trust under the Plan);  
10 conflicts of interest on the part of Mr. Polhill that would interfere with his ability to proceed to  
11 confirmation with the Amended Plan; self-dealing or waste or squandering of corporate assets.  
12 The only other facts given to support the proposed appointment are failure to list the Mudd claim  
13 as secured (the claim is secured by the recording of a judgment of which Debtor was unaware)  
14 and the failure to obtain general insurance liability on a piece of raw land (Trustee has  
15 acknowledged that at the Trustee’s request the Debtor obtained the insurance).<sup>4</sup>

18           44. The materiality of a debtor’s conduct must be determined in light of the  
19 circumstances of the case. The circumstances of this case do not support the Motion.

21           **Debtor’s Alleged Actions Are Not Material**

22           45. By inference, Trustee admits that none of the factors other than the alleged  
23 misconduct are present in this case; and he fails to demonstrate that the alleged misconduct is .  
24 material.

25           46. In determining whether a Section 1104(a)(1) appointment is warranted or in the  
26 best interests of creditors, the bankruptcy court must bear in mind that the appointment of a  
27

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28           <sup>4</sup> See Polhill Declaration.

1 trustee “may impose a substantial financial burden on a hard pressed debtor seeking relief under  
 2 the Bankruptcy Code,” by incurring the expenditure of “substantial administrative expenses”  
 3 caused by further delay in the bankruptcy proceedings.. In re Plaza de Retiro, Inc., 417 B.R. 632,  
 4 640 (Bankr.D.N.M., 2009).

5  
 6 47. In this case appointment of a trustee on the eve of confirmation of a liquidating  
 7 plan that provides for an independent trustee would require the estate to incur enormous  
 8 administrative expense to achieve a result that is about to be accomplished by the Amended Plan.

9 48. The appointment of a Chapter 11 trustee should better serve creditors,  
 10 shareholders, and the public interest by promoting efficiency, effectiveness and transparency,  
 11 traits which may have been lost by current management. In re Celeritas Technologies, 2011 WL  
 12 899782 \*3 (March 14, 2011). Trustee provides no reason why the interests of creditors or the  
 13 public would be served by such an appointment in this case. Debtor and Mr. Polhill have replied  
 14 to and complied with every request for information. The administration of this estate has been  
 15 “transparent”. There are no allegations that Debtor has been ineffective or efficient.  
 16

### 17 **Burden of Proof**

18 49. Trustee concedes that the only circuit court to determine the issue of burden of  
 19 proof required the “clear and convincing” standard. [Motion paragraph 49 referring to the Marvel  
 20 Entertainment Group, Inc. 140 F.3d 463, 471 (3<sup>rd</sup> Cir. 1998)]. In the Sundale decision<sup>5</sup>, Judge  
 21 Isikoff also considered the burden of proof and determined that court should follow a holding  
 22 from another circuit court of appeals unless it is convinced that court's decision is erroneous.”  
 23 noting the holding in Owens v. Miller (In re Miller), 276 F.3d 424, 429 (8th Cir. 2002) (“a sister  
 24 circuit's reasoned decision deserves great weight and precedential value”). To the extent the Court  
 25 considers this issue to be material, the holding in Marvel should be persuasive, not only for the  
 26  
 27

28  
<sup>5</sup> In re Sundale, Ltd., supra, 400 B.R. fn 8.

1 reasoning of Sundale, but also because the provisions of the amended Section 1104 inserted the  
2 word “shall” in its mandate to the Court. This strict result should require the higher burden of  
3 proof. Trustee cannot meet this higher burden of proof. Indeed, Trustee has failed to meet his  
4 burden of proof regardless of what standard the court chooses to impose.

5  
6 **Conclusion**

7 50. Trustee has failed to demonstrate “cause” for appointment of a Chapter 11 Trustee.  
8 The Court should deny the requested relief and take the steps necessary to promptly confirm  
9 Debtor’s Amended Plan.

10 DATED: April 4, 2011

12 McDONALD CARANO WILSON LLP

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